No. 2833

United States
Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THE CITY OF PORT TOWNSEND,

Plaintiff in Error,

vs.

THE FIRST NATIONAL BANK OF CENTRAL CITY COLORADO,

Defendant in Error.

BRIEF OF DEFENDANT IN ERROR

Upon Writ of Error in behalf of the Defendant below to the United States District Court for the Northern Division of the Western District of Washington

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STATEMENT OF THE CASE.

This cause is a part of a controversy waged now for some years between the City of Port Townsend and holders of sundry 'Indebtedness Fund Warrants' out of 158 warrants, aggregating in face value $67,483.47, issued on February 18, 1898, in liquidation of nine judgments of the Superior (or

trial) Court of the State there sitting, and then recently entered. All were issued pursuant to a resolution and order of the City Council, passed on February 16, 1898; each was marked with the words 'Indebtedness Fund,' and the brief title of the judgment in part payment of which that warrant was issued; and their serial numbers ran from 2 to 159. The judgment creditors were all different and unconnected persons; but the essential facts touching the merits of the controversy and of all the pending suits are either identical or parallel as to each warrant. Those facts have been before this court as to warrant No. 2, in

Intermela vs. Perkins, 205 Fed. 603;

and the record in this cause adds but little (and in our view that little unimportant) to the evidence there before the court.

This same cause was also before this court on a writ of error from a judgment of the then Circuit Court dismissing the complaint on a general demurrer; and the opinion of this court is reported in

First National Bank vs. City of Port Townsend, 184 Fed. 574.

The judgment below was affirmed on the ground that the complaint must show such a dereliction of duty by the city's officers to take the necessary steps

for providing the means to pay the warrants as to justify a writ of mandamus to levy a tax for the purpose.

The plaintiff was allowed to amend the complaint, and thereafter the cause proceeded to trial, and to judgment for the plaintiff in the sum of $28,978.69, on January 31, 1916. (Transcript, 125.)

The action was brought upon sixteen 'Indebtedness Fund' warrants of the city issued to the Bank of British Columbia, a British corporation, and fourteen others of the same series issued to the Manchester Savings Bank, a New Hampshire corporation, in part payment of judgments of the Superior Court of Washington in favor of the respective payees, which warrants aggregated $13,-950.80, with legal interest from February 18, 1898, and were later bought by the plaintiff. The complaint also avers that only a trifling amount of city debt entitled to be paid from the indebtedness fund prior to the warrants of said series remained unpaid; that the city from 1898 to 1908 had levied for the indebtedness fund from one-tenth of a mill to two mills on the assessed valuations—the statute requiring a levy of six mills when needed, but had made no later levy for said fund; and that the city had assets in the form of taxes collected and uncollected, and of proceeds of sales of land for taxes,

which are applicable to warrants of said series. (Transcript, 2-22.)

The answer pleads *verbatim* the complaints in the actions by said two payees in the State court in which the judgments were entered, to show that those judgments originated in street improvement warrants, which were not primarily city liabilities; that the State Supreme Court, before these judgments were rendered, had decided that special street assessments or warrants did not constitute city debts; that the city council knew that fact, and was guilty of fraud in allowing those suits to pass to judgment; that the State court was without jurisdiction to enter those judgments; that the city was then indebted beyond its constitutional limit, and there had been no popular vote to validate the 'Indebtedness Fund' warrants; that all the warrants Nos. 2 to 159 of that series had been ordered by the city council at an adjourned meeting, and not at a regular meeting, of that body, as required by law; and that this action was not begun within the time required by law. (Transcript, 25-84.)

The reply as amended denied that the ruling of the State Supreme Court was to the effect pleaded in the answer; denied that the warrants were ordered at an adjourned meeting; denied the defenses

of fraud, lack of jurisdiction and outlawry of the debt; and pleaded estoppel of record by the judgments for which the warrants were issued, and in particular by the decisions and judgments of the State Supreme Court in four cases (of which the Bank of British Columbia case was one) among said nine cases, which had gone up on appeal from dismissals on demurrers to the complaints, and on reversal had come back to the trial court and judgments for the plaintiffs had there been entered, which were four of the very judgments that were paid by the warrants. (Transcript, 84-91.)

A 'stipulation of facts' (Transcript, 137-161) contains most of the evidence pertinent to the issues. It shows the following facts:

The judgments in favor of the Bank of British Columbia and the Manchester Savings Bank were based on street grade warrants, which had been issued some years previously, pursuant to contracts made by the city with contractors, under ordinances directing street improvements at the expense of abutting property, and authorizing contracts therefor and the issue of special warrants to pay the contractors. These warrants were chargeable by their terms to a designated 'Street Improvement Fund'; and the city guaranteed their payment with

ten per cent interest, but there was no ordinance or resolution that the city should guarantee payment. The city failed to collect more than a small part of the special warrants from the property assessed, and after some years said two banks sued the city on those which they had acquired, as did also some other holders of like warrants. The result was a series of nine judgments drawing ten per cent interest, which are listed on page 144 of the Transcript. Numerous exhibits, including ordinances, contracts and warrants were filed in all of these cases (Transcript, 195-201), findings upon the issues of fact and law were signed by the judge, and in at least some of them defense was made by demurrer or answer. (See Transcript, 89, 93, 94, 138, 139, 192.) That was the case as to the two judgments in favor of said two banks—the plaintiffs' assignors of these warrants. Those actions, as shown by the complaints copied into the answer of the defendant herein (Transcript, 27-46, 47-68), were brought for the recovery of damages for breaches of the city's implied contracts in failing to collect the warrants from the property assessed, and in allowing the time for collection to lapse. Shortly after the entry of these judgments, negotiations between the city and the judgment creditors were opened—apparently induced by a demand for payment—and resulted in

an agreement to pay the judgments in full by six per cent warrants on the 'Indebtedness Fund.' (Transcript, 142-145.) The city charter required orders for payment of claims to be passed at regular, and not at adjourned, meetings; and the regular meetings were fixed by ordinance on the first and third Tuesdays of each month. The minutes of the regular meeting on February 15, 1898, are set out on pages 188-192 of the Transcript. All seven councilmen, the mayor, clerk, attorney and marshal were present. After disposing of other business, the clerk read a notice from the attorneys of the judgment creditors and without action on it the council took a recess to 3 p. m. of the next day. On that day, all the members were again present, the subject of the judgments was discussed, and the council formulated a resolution reciting that in its opinion these judgments were just and legal obligations, and ordering them to be paid, in 'Indebtedness Fund' warrants, with six per cent interest, on condition that all the judgment creditors, as therein listed, were to accept the offer by 3 p. m. of the next day, February 17th. Then another recess was taken to that hour and date, at which the judgment creditors formally in writing accepted the offer; and the warrants were all drawn and issued on the succeeding day. (Transcript, 142-153.)

Testimony in an attempt to support the defense of fraud was presented by the plaintiff in error, as follows:

A. R. Coleman, of many years' residence, in the practice of law, at Port Townsend, testified: He was consulted by members of the city council before the issue of the 'Indebtedness Fund' warrants. He examined the records of the judgments to advise the councilmen. The mayor and several councilmen asked him to advise them, not as at a meeting of the council, but as members of it, whether they should appeal from the judgments, or pay them. He examined the case of *German-American Bank vs. City of Spokane,* 17 Wash. 315, and gave them his opinion on the strength of it that the judgments could be reversed. The city attorney was not present. The mayor and councilmen said he had advised them to pay, but they lacked confidence in him and wanted Mr. Coleman's advice, privately. He named, at their request, the fee he would charge for an appeal; they paid for his advice, but declined to employ him to appeal. (Transcript, 162-166.)

George Anderson, the city clerk since 1906, produced the book of minutes of council meetings; and the minutes of February 15, 16 and 17, 1898, were inspected by the court. The minutes of the meeting of February 15th occupied two and one-half pages

and 'would be a short council meeting.' Under plaintiff's objection he was not allowed to testify to the average length of council meetings, nor how the meetings in 1898 compared in length with those of the present. The city has done nothing as to providing for payment of the warrants. It is his business to prepare statements of the city's liabilities, but in making the tax levies the city council does not take into consideration these 'Indebtedness Fund' warrants. (Transcript, 166-168.)

August Duddenhausen was city clerk in February, 1898. The minutes for February 15th were written by him and covered not quite two and a half pages. He could not remember whether that meeting was long or short; there were attorneys in Port Townsend from elsewhere, representing the creditors, and the council and the mayor tried to get the best conditions from them and for that reason the meetings were adjourned; they were not ready to take final action. Under plaintiff's objection as immaterial, he said that judging from the minutes and his recollection, that was rather a short meeting, probably lasting an hour and a half. The meetings then were usually about two hours and a half. On the morning of that day he was told that the councilmen and mayor would come to his office, but because it was small, they went into the treas-

urer's office and he asked whether he should go along. He was told he could, but need not take any minutes. It was not a regular council meeting. Five or six councilmen and the mayor were present and Mr. Coleman gave his advice. When they crossed the hall, Mr. Plumley, the city attorney, asked him if it was an official council meeting and he replied that it was not and Mr. Plumley then said that if so, he would not be present. (Objected to by plaintiff as a private conversation between the clerk and the attorney.) The mayor said in the treasurer's room that he did not want Mr. Plumley; that he had no confidence in him and that was the reason he engaged Mr. Coleman.

Cross-examination: The length of the minutes has some relation to the length of the meeting, but not always. When there was a debate over a motion he did not put down the debate in the minutes. Simply that the motion was made and whether carried or not. The pages in the minutes nearly indicate the length of the meeting unless there was something particular in the contents to explain why they would not agree. He could not judge from the length of the minutes at any one meeting absolutely whether it was a long or a short meeting.

(Transcript, 168-172.)

J. J. Bishop, county clerk, produced the court minute book, which showed entries in eight of the nine cases in which judgments were taken against the city (being all except the case of Alonzo Elliott, which had previously gone to judgment); these entries show filings of sundry exhibits and were all made under the date of December 18, 1897. (Exhibit 1, Transcript, 195-202.) (Objected to by plaintiff as immaterial and because the proceedings were merged in the judgments.) He had none of the files with him. The amended answer and reply in said case of *Manchester Savings Bank vs. City of Port Townsend* were introduced under the same objection. (Transcript, 181-188.)

U. D. Gnagey, said he was chief counsel for the defendant and had been city attorney for several years; the case of *German-American Savings Bank vs. City of Spokane,* 17 Wash. 315, decided on June 6, 1897, was generally known and discussed among some of the lawyers of Port Townsend at the time when these suits were brought against the city. It was known to Mr. Felger, who was one of the attorneys for the Manchester Savings Bank, and also to Mr. Plumley, the city attorney. He would not say it was discussed before the city council. (Transcript, 173-174.)

No evidence was offered in support of the defense that the statute of limitations had run against the warrants.

It was admitted by the defense that the case of *Bank of British Columbia vs. Port Townsend* was the same case that went to the Supreme Court previously and was reported in 16 Wash. 460. Upon objection to the relevancy of the fact because it was not pleaded, the plaintiff was allowed to amend its reply, which amendment is found at page 86-90 of the Transcript. The same is the fact as to three others of the nine judgments, all reported in 16 Wash., pp. 701-702.

The stipulation shows (pp. 154-155) the levies for the 'Indebtedness Fund,' 1888-1898, under Chapter 84 of the Session Laws of 1897, which enacts in Section 3 (Sess. Ls. 1897, p. 222) that every municipal corporation under 20,000 population shall levy and collect an annual tax for current expenses not over ten mills and 'a tax for the payment of indebtedness (if any indebtedness exists) not exceeding six mills on the dollar * * * and all moneys collected from the taxes levied for payment of indebtedness shall be credited and applied to a fund to be designated as "Indebtedness Fund" '. The aggregate amount realized from the levies for the 'Indebtedness Fund' from 1888 to 1898, inclusive, was

$12,351.01. (Transcript, 155.) The Legislature having enacted by said Chapter 84 of 1897 that all proceeds of taxes of 1896 and previous years should be paid into the 'Indebtedness Fund,' it appears by the list on page 156 of the Transcript that the amounts which had been realized in and after 1898 from tax rolls of previous years was $44,642.67; but all of this money appears to have been exhausted in payment of charges against the 'Indebtedness Fund' prior to the series of warrants issued to pay for these judgments. (Transcript 160, 176-180.)

Warrants Nos. 1 and 160 did not concern any of these cases and both have been paid. The city treasurer under orders by the council had transferred on his books $3,797.60 in three separate sums from the 'Indebtedness Fund' to the 'Current Expense' fund and at the time of the trial $527.07 stood on the treasurer's books to the credit of that fund. (Transcript, 156-157.) The city council has not ordered any levy for the 'Indebtedness Fund' since 1908 and by the passage of its ordinance No. 722 (Transcript, 161) the treasurer was required to pay no 'Indebtedness Fund' warrant excepting the 'General Expense', 'Fire and Water', 'Light' and 'Road' fund warrants. Accordingly, the city clerk testified that 'in making the city tax levies, the city council did not take into consideration these "In-

debtedness Fund'' warrants.' (Transcript, 168.)

The district judge made findings of fact and conclusions of law (Transcript, 109-116), in brief that the warrants in suit were issued in part payment of judgments of the Superior Court of Wash. ington for Jefferson County in favor of the payees after appearance by the defendant and on evidence; that the judgments bore interest at ten per cent; that the city council unanimously decided to pay those judgments and did so by the six per cent 'Indebtedness Fund' warrants; that they were ordered at a regular meeting of the council duly held and after deliberation; that they were purchased by the plaintiff in 1898 at a then fair market value in the ordinary course of business, without notice of any intention of the defendant to contest them; that there was no fraud or collusion in the payment of an unlawful claim; that the defendant has levied taxes as above stated, for the 'Indebtedness Fund,' but has made no levy since 1908; that the city has paid up its outstanding indebtedness prior in rank to the warrants serially numbered 2 to 159, but has transferred from the 'Indebtedness Fund' and used for other purposes other sums; that no call for any warrants has been issued nor have any been paid except Nos. 1, 2 and 160, and that the amount due on the warrants in suit was $13,952.80, with interest.

From these facts he drew the conclusions that the warrants were valid and subsisting liabilities; that the defendant was estopped by the judgments in liquidation of which the warrants were issued from relying on any defenses which might have been pleaded to those actions, including the defenses that the city was not liable on the causes of action sued on in said former actions and was already indebted beyond its constitutional limit; and that it was the defendant's duty to levy a proper tax, in the amount of six mills on the dollar, for the 'Indebtedness Fund' during every year beginning with 1898, and to apply the proceeds to their proper use, according to law until the warrants in suit were paid. Accordingly, a judgment was entered against the defendant for $28,978.69 as the indebtedness due to the plaintiff upon the warrants in suit 'and that the plaintiff have process of this court in its favor against the defendant for the collection of said indebtedness and costs, according to law and the practice of the court.' (Transcript, 126-126.)

The district judge filed an opinion in which he carefully considered the pleadings and evidence in this case and also in an equity case between the same parties, which is not now before this court, and in which he came to the conclusion that none of the defenses is valid. (Transcript, 204-216.)

ARGUMENT.

The defendant has assigned nine errors and argued them under eleven numbered heads. But in summary form this writ of error really involves only two questions:

(1) Are the warrants in suit, and is the judgment, a valid debt of the defendant?

(2) If so, has the city yet become derelict in its duty to pay its debt?

In other words, first, is there a lawful debt, and second, is the city now bound to pay it by a tax levy?

On the first question we might well rely upon the doctrine of *stare decisis. Intermela vs. Perkins,* 205 Fed. 603, was a thorough consideration by this court of the same subject on almost identical issues and with almost identical evidence. After the opinion was announced there was an elaborate petition for rehearing; the petition was denied, and a petition for a writ of *certiorari* was presented to the Supreme Court. Briefs in support and in opposition to it were filed and the petition was denied, without an opinion.

Intermela vs. Perkins, 231 U. S. 757.

That case involved, as we have said, nearly identical issues. There was a technical defense which does not occur here, that the jurisdictional amount was lacking. That defense was overruled and thus the court was brought to the merits of the cause. On the merits, the same defenses were made in nearly the same language as in this case, except the defense of fraud. But that defense was practically raised and argued before the lower court and in the briefs here; and the same evidence, as the record shows, bearing on that defense, was before the court, except the oral testimony presented herein. Of that, more later. Therefore, we say, that we and this court might well stand on the doctrine of *stare decisis.* For courts are not inclined, after thorough consideration of the facts and the law of a controversy in one case which really involves the merits of large liabilities of the same defendant to other parties not before the court, and when that consideration has been had by three successive courts from the lowest to the highest, to disrupt the harmony and continuity of their decisions, which are so essential to any settled system of justice. There is no need to labor the point. It is bred into the bone of every lawyer and every judge.

Nevertheless, since the defendant is not content to accept one decision of this court as settling the law of these liabilities, we will, without waiving our reliance upon the doctrine of *stare decisis,* now proceed to discuss the defendant's points in the order in which they are stated in its brief.

I.

HAS THE PLAINTIFF A GOOD TITLE AT LAW TO THE WARRANTS?

The objection to our recovery that the warrants are insufficiently or improperly indorsed is purely technical. The court can see by inspection that they were indorsed by their payees. But even that was unnecessary. Title to negotiable or non-negotiable paper, even such as is payable to order, may be proved by evidence of actual delivery, payment of the price, and present possession by the person suing on it. Mr. Lake, the cashier of the plaintiff since August, 1904, testified that the bank's books show that the warrants in suit were purchased in the ordinary course of banking business, and for cash, in March, June and July, 1898, and had been assets of the bank, on its books as such, ever since then. He gave a list of them, which agrees with those produced by the plaintiff's attorney at the trial and filed as exhibits, and said on cross-examina-

tion that no one else 'had any interest in the warrants and the bank is the absolute owner of them'.

(Deposition of H. H. Lake, Transcript, 134-136.)

These warrants are non-negotiable in the sense that the transferee does not take them free of any defenses which might be made against them in the transferor's hands; and they are payable to order. But even such paper can be transferred and good title to it made by actual delivery, in the absence of a contrary statute.

Ashworth vs. Crockett, 11 Mo. 636.

Hill vs. Alexander (Kans.), 41 Pac. 1066.

With paper payable to order, the law merchant requires other evidence of transfer than mere delivery; and such evidence we have here.

Redmond vs. Stansbury, 24 Mich. 445.

Crisman vs. Swisher, 28 N. J. L. 149.

Instead of a statute to the contrary in Washington, the Uniform Negotiable Instruments Law, in force there, declares:

> 'Where the holder of an instrument pay-
> 'able to his order transfers it for value without
> 'indorsing it, the transfer *vests in the transferee*
> *'such title as the transferor had therein*, and the

'transferee acquires, in addition, the right to 'have the indorsement of the transferor. But 'for the purpose of determining whether the 'transferee is a holder in due course, the ne- 'gotiation takes effect as of the time when the 'indorsement is actually made.'

Remington's Codes of Washington, 1915, § 3440.

Obviously the last sentence has no application here, because the rules about 'due course' have no bearing on non-negotiable instruments. Since they are open to defenses, whenever acquired, 'due course' is immaterial. Therefore we have all the title that the payees had, whether the indorsement is technically complete or not; and that suffices to maintain the suit.

We must keep clearly in mind the distinction between indorsement as a means of increasing the holder's security by charging the indorser and by showing acquisition in due course free of defenses, and indorsement as a mere means of proving title in the holder. As the former, it is vital; as the latter, it is a convenience, but not a necessity.

Huntington vs. Lombard, 22 Wash. 202.

Thomson-Houston Elec. Co. vs. Capitol Elec. Co., 56 Fed. 849.

II.

HAS THE PLAINTIFF SHOWN THE DEFENDANT TO BE DERELICT IN ITS DUTY TO PAY ITS DEBTS, SO THAT IT IS SUBJECT TO A WRIT OF MANDAMUS?

As we have said already, two main questions cover all the minor points: Is the city indebted to us? And has it yet failed in its duty to pay its debt? Logically, the first question precedes; but since the defendant's counsel have chosen the reverse order, we must assume till later that the city is lawfully indebted to us on these warrants.

Coke says, 'Execution is the end of the law.' Actual and peremptory enforcement of the judgment: that is true of every court, of whatever jurisdiction, under whatever sovereign. Methods and processes vary; the end of all is the same: payment or performance. The statutes of Washington provide that a city's debts shall be paid only by warrants, and that where the debt is a judgment, it too must be paid by warrants, on filing a satisfaction of the judgment. The warrant is merely a serial voucher of the accounting officer, and is to be converted into cash presently or later, as the city treasury is in funds. There can be no writ of execution, no *fieri facias,* against a city.

Sess. Ls. 1869, p. 154, Sec. 604;

Remington's Codes (1915), Sec. 953;

Sess. Ls. 1890, p. 186, Sec. 119;

Remington's Codes (1915), Sec. 7671-19.

(The citations to 'Remington's Codes', which is the latest and best compilation, are duplicates of the session laws, and are given for convenience of reference. The session laws show that the law was as we state it before the warrants were issued.)

If judgments are to be turned into warrants, and the warrants in turn are to be put in suit, as a note of an individual is, there would be an endless chain. Therefore the state courts hold that an action at law on a city warrant does not lie, but the proper method to enforce the warrant is to seek a writ of mandamus; and before it issues the city can both (a) contest the merits of the claim, and (b) dispute its present duty to pay it.

On the other hand, the federal courts, deriving their jurisdiction from another sovereign, hold that they cannot be bound by state statutes and court practice; and hence they entertain actions at law against cities on their warrants, but require the holder to prove not only the debt, but the city's delinquency in paying it.

The decisions on mandamus to a city council to levy a tax for a city debt are only special applications of the fundamental principle of the whole law of mandamus: that the writ is not issued to enforce a discretionary duty, a duty only to exercise one's own judgment, at his own choice of time, means and manner, but it is issued to compel prompt discharge of a duty to do a definite act presently. And that comes about through the peculiarity of municipal corporate finance: that the city's debt is not presently due and collectible till it either has the cash in hand or the means and power to procure the cash. Municipal corporations are limited in the subject-matter, purposes and amounts of the debts they may incur; and after incurring them in the rate at which they can pay them. The private corporation must pay present debts even to the whole of its capital, or go to the wall. Not so the city; it has only the power in any one year to levy on its taxpayers a few cents or a few mills on the dollar to pay a given class of debts. In that sense, then, a city's debt is not due—that is, *collectible*—till it either has the means to pay it, or the power to get the means.

These very simple ideas lie at the bottom of all municipal finance and of the law of municipal indebtedness. And since the whole law of contracts

is based on the idea that honest debts are to be paid, there is a natural presumption that a city ought to exercise its power to the legal limit to pay its debts. Hence the courts should not strain technical rules to enable the city to avoid or procrastinate payment. And all the decisions on mandamus to a city council really imply this; they only require a plain, present duty to be brought definitely home to the council.

This court in its decision on the first writ of error in this cause, 184 Fed. 574, held, following

> *State ex rel. Am., etc., Mortgage Co. vs. Mutty,* 39 Wash. 624,

that the plaintiff must prove more than a mere failure to levy a tax to the legal limit—six mills; it must prove a dereliction of duty by the city officers. Accordingly, the complaint was amended, and facts were proved which, we believe, show a gross dereliction of duty.

Let us look for a moment at that case in the 39th Wash.

That, too, was a case against Port Townsend, on indebtedness fund warrants. It was brought in 1909. The city council had levied only one mill for the indebtedness fund. The petition for the writ

only showed that the warrants were unpaid; the relator had demanded a six mill levy, which was refused; the city for some years had not made a full levy, and even that would not pay his warrant, in view of the prior outstanding warrants and the city's assessed valuation; but it did not show what other resources than the levy the city had. It sought a writ to compel an additional five mills levy.

The state court held, on demurrer to the alternative writ, that the showing was insufficient, because the statute of 1897 (ch. 84, Sess. Ls. 1897) provided for the establishment of two funds—indebtedness, and current expense—as distinct funds, with a separate limit of tax levy for each, abolishing all preexisting funds, and for the payment into the indebtedness fund of all receipts after February 1, 1898, from taxes of 1896 and previous years. Such receipts and the uncollected taxes from levies for that fund since 1897 therefore were assets of the fund, and the city council was to take into consideration the amount of the outstanding warrants and also said assets of the fund—of the amount of which there was no showing—and hence it had a lawful discretion to exercise in the matter, which could not be controlled by mandamus; and the presumption was it had levied year by year enough.

That decision then was based on the very narrow ground of a debatable discretion of the council to levy a six mill tax, and on the rather violent presumption that a levy of one mill on $930,946 valuation sufficed with some old taxes that had run over eight years to keep up with a warrant indebtedness of $125,000. It held that there was no duty to make additional levies until those already made had proved ineffectual.

Now for the facts in this present record. First, then, we summarize here for the court's convenience, and as the fundamental fact of the situation, Chapter 84 of the session laws of 1897, because it abolished the prior plan of municipal finance, set up a new plan, and by a clear line of demarkation cut off the old method from the new. To make a clear slate and start even, it loaded all accumulations of prior debts on the indebtedness fund, and left the current expense fund to bear only after-accruing expenses.

> *State ex rel. Polson vs. Hardcastle,* 68 Wash. 548, 553.
>
> *Intermela vs. Perkins,* 205 Fed. 605, 607.

Ses. 1 creates in cities of under 20,000 population a 'current expense fund' and an 'indebtedness fund'.

Sec. 2 devotes to the 'current expense fund' all licenses.

Sec. 3 declares that cities shall levy annually a property tax of not over ten mills on the dollar for current expenses and ' tax for the payment of indebtedness *(if any indebtedness exists)* not exceeding six mills on the dollar'. All moneys collected from the levies for these funds 'shall be credited and applied by the treasurer to' them respectively.

Sec. 4 directs that the 'current expenses' levy shall be based upon an estimate of the expenses for the coming year, to be adopted by a majority vote of the council and in making the estimate the probable revenues from licenses and other sources, not taxes, shall be considered. 'Current expenses' shall include all expenses of carrying on the city government.

Sec. 5 directs that the indebtedness tax shall be baesd upon a statement of such indebtedness to be 'prepared by the clerk and approved by the council' when the levy is made and to be 'entered in the record of the proceedings of the council'. 'In making the levy consideration shall be taken of all outstanding warrants, certificates and all other obligations and indebtedness of the city with the interest thereon for the payment of which no pro-

vision is made by law, by the levy of a special tax, or otherwise than by a general tax'.

Sec. 6 passes to the 'current expense fund' all moneys to the credit of the street fund or the sewer fund over outstanding warrants.

Sec. 7 orders that all moneys collected on and after February 1, 1898, ~~and~~ from taxes of 1896 and previously and their penalty and interest, shall be paid into the indebtedness fund.

Sec. 8 requires that after February 1, 1898, all moneys payable into the general fund except taxes, shall be passed to the 'current expense fund'.

Sec. 9 says that after that date all current expenses shall be paid out of the 'current expense fund'.

Sec. 10 orders separate funds to be maintained by any city which owns water works or other public utility—which does not apply here.

Sec. 11 provides for the case of the extension of the city limits—which does not apply here.

Sec. 12 provides for the validation of public debt by any city consolidated with another.

Sec. 13 is the usual emergency clause.

Chapter 84, Session Laws 1897, pp. 222-225, approved March 16, 1897.

Second—the assets of the indebtedness fund:
(a) Taxes of prior years.

The city was incorporated by special charter in 1881. (Transcript, 28.) The taxes prior to 1898, paid after the statute of 1897 was passed, are stipulated to amount to $44,642.67. (Transcript, 156.) The defense also stipulated that the city treasurer collected the delinquent taxes for 1891-1894, inclusive, after February 1, 1898, when that law took effect; that the delinquent taxes for 1895 remaining unpaid were foreclosed in 1902, and when the tax-deed to the county was taken in 1903, the city taxes for 1895 then unpaid and represented in that deed were $3,450.12; and the unpaid taxes for 1896 were also foreclosed and when the tax-deed was taken in 1904, the city taxes for 1896 then unpaid were $4,284.79. (Transcript. 158-159.) Apparently these sums are not parts of the delinquent taxes tabulated on page 156 as collected from 1898 to 1904. We have, then, as the proceeds of taxes levied before 1897:

Taxes levied before 1895, collected 1898-1905	$44,642.67
Taxes levied in 1895 resulting in tax-deed, 1903	3,450.12
Taxes levied in 1896, resulting in tax-deed, 1904	4,284.79
Total	$52,377.58

(b) Levies after 1898, and other assets.

The aggregate of the levies for this fund from its creation in 1898 to 1908, inclusive, was 11.75 mills, or an average of almost $0.00107 per year, and the gross proceeds were $12,351.01, if every cent levied was collected. It does not appear that any of it remains unpaid. (Transcript, 155.)

The only remaining assets of this fund are $527.07 to its credit in the city treasury and the right (if that is an asset) to a return to that fund of $3,797.60, transferred from it in 1898, 1909 and 1910 to the sinking fund and the current expense fund by order of the council. (Transcript, 156-157.)

The indebtedness fund, then, has produced since its creation in 1898 these sums:

Taxes levied before and realized after 1897 (including tax-titles)	$52,377.58
Taxes levied after 1897	12,351.01
Total	$64,728.59

Of course the cash transferred to other funds and that now in hand were portions of this total and are not to be added to it.

Third—the disposition of these assets:

On February 1, 1898, when the new system began, there was out in face value of warrants on

the fire and water fund	$ 891.35
the road fund	2,016.27

the light fund	6,680.25
the general expense fund	31,150.70
Total	$40,738.57

There is, then, an apparent surplus of about $24,000 in the indebtedness fund over said old warrants which were prior to the warrants on that fund, and all of which it is agreed have been paid. (Transcript, 159-160.)

But certain deductions and allowances must be made. The resources of the indebtedness fund were not all converted into cash. The 1895 and 1896 unpaid taxes became tax-deed titles, representing $7,734.91, and it does not appear that the lands have been sold yet. There was switched by the council's orders, from that fund to other funds $3,797.60, and there is now in that fund $527.07. The face amounts only of the old warrants are given. Twenty per cent of their total or, say, $8,000.00, seems a reasonable estimate for the accrued interest on these warrants of unknown dates between 1881 and 1898, and which were paid off gradually after February 1, 1898, as cash came into the indebtedness fund from prior taxes (see Transcript, 156) and the meticulous levies of later years (Transcript, 155). We have, then,

Surplus of indebtedness fund		$24,000.00
Tax-titles	$ 7,734.91	
Transferred to other funds	3,797.60	
Cash in fund	527.07	
Estimated interest on old warrants	8,000.00	
Totals	$20,059.58	$24,000.00

The difference is accounted for approximately by the indebtedness fund warrants, Nos. 1 and 160, of small but unknown amounts, and the indebtedness fund warrant No. 2, $1,548.12, which resulted in the Perkins judgment for $2,933.84 and costs, on February 15, 1912, affirmed on writ of error in this court (205 Fed. 603) on May 5, 1913.

Fourth—the attitude of the city council:

The defense makes a hypocritical pretense of willingness to discharge its legal duty, but avers it has done all it was bound to do. Let us see.

The indebtedness fund has existed for nearly nineteen years. During that period the fund has had outstanding warrants on it to the total of $67,-483.47. The accrued interest is about 112 per cent,

an annual increment of	$ 4,049.01
and a total of, say	75,581.00
making an aggregate debt of, say	143,065.00

All this time, the city has had an assessed valuation averaging about $1,000,000.00. By a six mill levy it could have raised one year with another

$6,000.00 and thus have gained slowly on the debt. What has it done?

It has levied in nineteen years 11¾ mills, instead of eleven cents and four mills, as it might have done.

It has disobeyed the express mandate of the act of 1897 that it 'shall levy and collect annually * * * a tax for the payment of indebtedness *(if any indebtedness exists)* not exceeding six mills on the dollar'.

It has disobeyed the other mandate of the same act that 'in making the levy, consideration shall be taken of *all outstanding warrants,* certificates and all other obligations and indebtedness of the city, with the interest thereon, for the payment of which no provision is made by law, by the levy of a special tax or otherwise than by a general tax'. Sec. 5, Ch. 84, Sess. Ls. 1897. Its city clerk admitted that 'in making the tax levies the city council did not take into consideration these indebtedness fund warrants'.

(Deposition of George Anderson, Transcript, 168.)

It has further disobeyed another express mandate of the same statute that 'all moneys collected from the taxes levied for payment of indebtedness

shall be credited and applied to a fund to be designated as "indebtedness fund" '. Sec. 3. It is a dishonest trick and sham to let money go into the proper fund and then by a bookkeeping transfer use it for a foreign purpose.

It has substantially exhausted the resources of that fund, and then for eight years refused to make any levy for all that huge debt of the fund.

It has passed an ordinance which, in violation of the vested rights of creditors of that fund and in impairment of the obligation of the city's contracts, forbids the city treasurer to pay any 'indebtedness fund warrant except the "general expense", "fire and water", "light" and "road" fund warrants *without the special order of the city council'*. Sec. 9 of Ordinance No. 722, passed Sept. 4, 1906. (Transcript, 162.) No such 'special order' has ever been given. By holding up the treasurer on a call for such warrants, the council has both violated the obligation of the city's contract to pay when there is money in that fund, contrary to the state and the federal constitutions, ~~but~~ *and* it has made the treasurer violate his official duty and oath. For the law ever since 1895 (Ch. 152, Sess. Ls. 1895) has declared that 'whenever the treasurer of any * * * city * * * shall have in his hands as such treasurer the sum of

five hundred dollars, belonging to any fund upon which warrants are outstanding, *it shall be his duty* to make a call for such warrants to that amount in the order of their issue, and he shall' publish or post the call.

This duty is imperative and not dependent on the council's will.

State ex rel. Polson vs. Hardcastle, 68 Wash. 548.

'If the legislature of the State cannot divert a fund to the detriment of a warrant holder (*Hardcastle* case, *supra*), much less can the city council do so, and that without any semblance of authority from the legislature.'

Intermela vs. Perkins, 205 Fed. 603, 608.

The city admits that warrant No. 3 stands next in order of payment, and that there was in the fund on April 28, 1915, $527.08. (Transcript, 157, 160, 161.)

There is therefore the highest presumption, if not positive certainty, that the city council has for years violated its duty to make immediate provision by levy for paying these warrants; that it has exhausted substantially all the resources of this fund except the right to levy, in paying large prior and

lawful charges on it and some which were not lawful charges on it; that it has exercised no genuine and honest 'discretion' as to the need of a levy, but simply and baldly repudiated the debt, and now in pursuance of dilatory tactics long pursued pretends that it is not shown to be derelict in the duty to levy, while its real contest is on the merits of the debt.

We have, then, a case for a writ of mandamus to the city council to

> 1. Order the treasurer to make a call and pay out $500.00 from the indebtedness fund;
> 2. Restore to this fund $3,797.60, wrongfully diverted to other funds;
> 3. Levy a six mill tax annually till our judgment shall be paid in full.

The findings are criticized as not showing the condition of the indebtedness fund. To which, there are two answers: (1) All the evidence at the trial is before the court, and it shows fully the state of the fund, as above discussed, so that whatever might be the case if the findings were here without the evidence, we have here the evidence to support the judgment; (2) the findings state the ultimate, not the evidenciary, facts, and show that the council has diverted money from the indebtedness fund and has not discharged its duty under the statute to levy the tax *'if any indebtedness exists'*.

If it is claimed that because the record fails to show what amount of delinquent taxes prior to 1891 still remains unpaid and how much has been collected since 1905 from the delinquent tax rolls of 1891-1897, and therefore that the city council presumably still has resources which it may apply without resorting to a levy, the sufficient answer is that a presumption of payment arises as to all taxes, real and personal, which remain unpaid after six years.

Graves vs. Stone, 76 Wash. 88,

Seymour vs. Ellensburg, 81 Wash. 365.

III and IV.

ARE THE FORM AND THE AMOUNT OF THE JUDGMENT CORRECT?

This is an action at law, not a 'special proceeding' for a writ of mandamus. The plaintiff must prove both a legal cause of action and a state of facts which justifies enforcing it by that writ. Hence, the judgment was drawn as in any case at law—to adjudge a legal liability for a definite sum due at its date. Apparently the defendant's counsel have confused the ideas of jurisdiction and of practice, and would have had us draw the judgment in the form of a peremptory writ of mandamus. But that is not the practice in the Federal Courts. The

judgment is enforced by the writ, but is not the writ itself. In the sense of being "owing' the debt is adjudged to be 'due'. It is collectible not forthwith, but in process of time, by means of the writ, under the statute. Hence the judgment is in proper form, as a necessary preliminary to the writ; and whether the next money in the fund must be paid to the judgment creditor or to some other who has a prior right to it, the adjudication of a debt must precede the writ as a *sine qua non* to compel the council to act.

Similarly, the judgment was drawn, as all judgments at law are, to establish the amount of the debt on its date. It does not allow or adjudge future interest. If we shall become entitled to such accruing interest, it will be because the *law,* not the judgment of the court, allows it to us as an incident of the judgment.

The statute, after stating that judgments on written contracts shall bear interest at the contract rate not over ten per cent, proceeds: 'All other judgments shall bear interest at the rate of six per centum per annum from date of entry thereof'.

Sess. Ls. 1899, ch. 80, § 6.

Remington's Codes (1915) § 457.

Such interest would not be compound interest

on the warrants, but like costs, a mere incident of the judgment, without which we never would have been able to realize anything on our just claims. In that sense, it would be a penalty for not paying a just debt earlier, as the city could have done by a full levy each year.

But that question is not before this court now, and will not be before the lower court till there is cash in the city treasury, the payment of which will include interest accrued since the date of the judgment. The judgment simply declares the amount 'due', that is, 'owing', by the city on our warrants at its date, and then says that we shall 'have process of this court' to collect it 'according to law and the practice of the court'. As the only process we can have is a writ of mandamus, when it comes to the point of suing out the writ the court will mold the writ to suit the circumstances and exigencies of the case, as they then exist, 'acording to the law'. In the writ it will give the proper directions as to disposing of the money which the court will require the city to raise by taxation.

V.

DOES THE AMENDED COMPLAINT STATE A CAUSE OF ACTION?

The sole criticism of the complaint under this

head is that it does not allege a demand and a refusal of the council to levy a tax (although it does allege a demand and refusal of the city treasurer to pay the warrants); and it does not show the amount of cash on hand.

The latter point is met by the defendant's admission of the amount on hand after the case was at issue. (Transcript, 157.) Indeed the stipulation of facts shows in full and clear detail the state of assets of the indebtedness fund, and the disposition made of them. These facts being in the record by mutual consent, any vagueness of the pleadings will be taken to be cured as by amendment.

The point of no demand is met by the rule that the law does not require a vain thing. It is perfectly obvious that the council would have refused compliance, because the city contests these and all other warrants of this series on the merits. A demand is meant to give a chance to comply; and if it is evident there was no intent, with or without demand, to do the act desired, demand is useless. If on the other hand, for lack of a demand which would have been obeyed, the defendant has been needlessly sued and damnified, he can plead in abatement that he would have complied if given the chance and was and still is 'ready, able and willing';

and the suit will abate. But here there is no such plea, nor even one that they are now willing. And if there had been a plea in abatement, its joinder with pleas in bar would have waived it.

All this, however, is the technique of practice. The substantial answer is that we have to show that a debt is owing which the city has not present means to pay, but it has power and resources which it should use to hasten payment; and the demand on the council is only a last formality after the essentials of reducing the debt to judgment have been duly established. That should come after, not before, the action at law, as the quotation from 13 Ency. Pl. & Pr. in the defendant's brief, p. 26, shows. The defendant's argument on this head, too, clings to the confusion of thought between an action at law on a city debt in this court and a special proceeding for mandamus under the code in the state court.

VI.

HAS THE STATUTE OF LIMITATIONS RUN ON THE CAUSE OF ACTION?

The argument here seems to be that because the statute does not begin to run on a warrant till we can sue on it, and we cannot sue on it till the treasurer has the cash to pay it, *therefore* the statute

began to run in 1898 when the city should have begun to levy taxes to pay the warrants! A curious *non-sequitur!* Another instance of confusion of thought between two distinct things: a suit against a treasurer for the cash which he has in hand and will not pay on a warrant next in order of payment, and a suit against a city council to compel it to put money into the treasury. If the suit will not lie till there is cash in the treasury, then the city can put it off forever by simply not raising the money, and the debt will never outlaw and never be paid. On the other hand, the argument seems to be that we could sue as soon as the council failed to levy a six mills tax to pay the warrants—which was in 1898. Therefore, the six years statute then began to run. But the learned counsel have been arguing that all these years the city has had many other resources than a levy, and the council still has a discretionary right to consider all the liabilities and resources and decide whether in its judgment it is necessary to levy a tax to meet the warrants; and therefore, we have not yet a case ripe for mandamus! The arguments are mutually destructive.

There is no statute of limitation on such an action as this. The six years statute as to actions on written contracts runs from the date when they mature. That applies to a warrant for which there

is cash in the treasury, because it is then presently payable; and such a suit would be brought against the treasurer for refusal to pay. It would not lie against the city itself. On the contrary this action is to get a judgment that the warrant is owing, as a preliminary to process to make the city put money into the treasury to pay it. Not the warrant only, but the breach of the duty to raise the money to pay it is an essential part of the cause of action. No statute of Washington applies to that breach. Up to a few years only before this suit was brought in 1910, the city was still realizing cash from assets of the indebtedness fund—both old tax-dues and current levies. There was at least a plausible or a debatable ground for insisting that the city was doing its duty. Soon after that plausible ground vanished, this suit was brought. (Transcript, 155-156.)

See Transcript and brief in this cause on former writ of error.

First Nat. Bank vs. Port Townsend, 184 Fed. 574.

It cannot be true *both* that the time is not yet ripe for a mandamus, and the cause of action is outlawed. Nevertheless it does not follow that because one is not true, the other is. They are not

necessarily reciprocal alternatives. This defense is to be tested on its own ground—has the cause of action in this case existed so long before suit was brought that it is barred by lapse of time under any settled rule of law or applicable statute? No such rule of law and no such statute is pointed out by the defendant's brief.

VII.

WERE THE WARRANTS ORDERED AT A LEGAL REGULAR MEETING OF THE CITY COUNCIL?

This is the issue of the so-called 'adjournments' on February 15 and 16, 1898. The subject was most thoroughly investigated as to the facts, and discussed as to the law in the lower court and at this bar in

Intermela vs. Perkins, 205 Fed. 603,

and was completely disposed of by the opinion of his Honor, Judge Wolverton. The same minutes of that council meeting on the three days, February 15, 16 and 17, were before the lower court in that case as in this: and of course they are the best and the conclusive evidence of the actual facts. See the Transcript in the *Intermela* case on the files of this court, and 205 Fed. 611, 612; and compare that

record with the record in this cause, at Transcript, 188-192, 166-167. The court's findings on this issue of facts are the 7th, 8th and 10th, pp. 112-114. The judge personally inspected the minute-book; p. 167. The bill of exceptions states that a copy of the minutes of the three days' proceedings, February 15, 16, 17, is shown by Exhibit B; but that exhibit only contains the minutes of February 15. (Transcript, 188-192.) They distinctly state that after the proceedings stated in them, '*on motion the council took a recess until three o'clock P. M. February 16, 1898*'. But, although Exhibit B is defective in not giving the minutes of the other two days, we have the essence of them. For it is stipulated that on February 16, at the hour set, all the members of the council were present and the subject of paying the judgments was discussed and a resolution was unanimously passed, reciting the judgments and the council's opinion that they were just and legal claims and should be paid, and therefore that they were '*hereby allowed and ordered paid as claims against said city and that warrants be drawn in the usual form*', etc. But this allowance was conditioned 'that *all of said parties accept the conditions herein named on or before February 17, at three o'clock P. M.*

On the next day all the judgment creditors filed

their written acceptance; and thereby the order of allowance passed by the council on February 16 became absolute. (Stipulation of Facts, Transcript, 143-145.)

The facts as to the recesses continuing the meeting from the 15th to the 16th, and from the 16th to the 17th, are stated more fully in the record in *Intermela vs. Perkins,* 205 Fed. 603, and in Judge Wolverton's opinion on page 611; but, in fact, as we have shown, the warrants were ordered on the 16th and not on the 17th, and we have in this record without referring to that case, the most explicit proof that the meeting was continued by recess and not by adjournment. The two cases are therefore identical on this defense of 'an adjourned meeting', and that issue was squarely met and flatly defeated by the opinion in the *Intermela* case. While it is not *res adjudicata,* because the plaintiff here is not in privity with Perkins, it is as plain a case of *stare decisis* as can exist. It is not only a parallel instance, as usually occurs when the doctrine of *stare decisis* applies; it is the *identical* instance: the same meeting, another of the same judgment creditors there present and accepting, another of the same series of warrants, springing out of the same negotiation.

But the defendant's counsel in this case at-

tempted to raise a distinction based on a few words in the opinion of this court in the *Intermela* case. It is there said, incidentally, and not as essential to the legality of a recess that the council '*finding itself unable to complete or transact the business in hand,* took a recess'. 205 Fed. 611. And upon that slight peg is hung the attempted defense in this case that the meeting on February 15th was so short that there was ample time then to dispose of this subject of the judgments and say 'Yes' or 'No' on any question of payment, and because that was not done, the meeting of February 16th was not a 'recess' meeting, but an 'adjourned' meeting, and therefore that and all the warrants were illegal!!

In support of this remarkable theory that council meetings and the contracts authorized thereat are to be tested by the clock, there were produced the city clerk then in office, and his successor, the present clerk.

(Testimony of Anderson and Duddenhausen, Transcript, 166-72.)

All that their testimony came to was that the meeting of the evening of February 15th was rather short; Duddenhausen, the then clerk, could not 'particularly recollect'; he thought so, 'judging from the minutes and my recollection'. 'The length of the

minutes has some relation to the length of the meeting, but not always'; they would not indicate 'absolutely whether it was long or short'. The strongest impression on his mind was that the meetings were continued because the council and mayor *'tried to get the best conditions'* from the non-resident lawyers representing the creditors *'and for that reason they were not ready to take final action; that is about it'.*

Anderson, the present clerk, testified that, judging from the minutes of the council meetings generally, the meeting of February 15th was a short meeting; but he was not allowed to testify from an inspection of the book how the meetings in 1898 compare in length with those of 1915. Experts are permitted to state many things which they extract from looking at writings, but we have never yet known a court to allow a witness to tell by looking into a minute book written by another, how long a meeting twenty years ago lasted.

The testimony is of the vaguest, as a measure of the length of the meeting. But even if we had had by an automatic clock an exact record, what of it? Are we to hold a stopwatch on a city council? Are its acts and the rights of contract based on them to stand or fall on the time they took, and the time left unused on that evening? Absurd! But

that is where the counsel's argument leads. If the matter could have been debated and voted on in another half hour or even hour and a half, before a late bed-time, the council was bound to do it, and so the recess meeting of February 16 was illegal and all the warrants fall! Why not say at once they were bound to stay no matter how long and end it? But as suggested by Judge Wolverton, the council 'found itself unable to *complete or transact the business in hand*'. The learned counsel have forgotten that it takes time, deliberation, negotiation to complete many important matters. The old clerk said truly, the city officers were trying to get the best terms. They could not close them that night. So they took a recess to the next afternoon. And the very fact that they entered on their minutes that they took 'a recess' shows that they had in mind the charter restriction as to 'adjourned meetings', and heeded it, and therefore advisedly and deliberately did everything in due order.

Both the spirit and the letter of the charter were obeyed. As was ruled in *Intermela vs. Perkins,* a recess from hour to hour or day to day may keep alive a meeting for a specific purpose of business then 'on the table', which could not be done by adjournment to a remote date, or for the purpose of taking up new business. No authority cited or

that we can find goes to the extent of denouncing such a recess. And the reasonable interpretation of the charter provision is that it only forbids the transaction of *new* business, not previously submitted to the council at the date of a regular meeting and thus announced to the public. The abuse at which it was aimed was the introduction of new business at a deferred session, thus facilitating the concealment of something which could not bear publicity.

Now in this affair any citizen in attendance on the evening of February 15 and all the councilmen were informed by the clerk of the demand made by the creditors. They knew that it was held open, and was the only matter so held, for consideration on the next afternoon. It was of deep importance to the city, whose officers were trying to do their best. Evidently negotiations were afoot. We may presume that they had to be disposed of, or at least it was for the city's interest to do so, without delay. It was a proper situation for a recess to consider, negotiate and decide. That is the sensible, rational view of the case. It was a sincere, genuine recess for that sole purpose.

Seymour vs. Ellensburg, 81 Wash. 365, is cited to the rule of strictest compliance with statutory requirements as to municipal powers. The general

principle we admit; the defense strains it excessively in applying it here. There the question was whether warrants which omitted all indication of their purpose were valid. Obviously they were not, for words stating the purpose are as much a part of the essential contents of the warrant as its amount or the signatures. And that is just what the Supreme Court of Washington said: that if the warrant need not specify the purpose, 'then any other requirement of the statute as to what *the warrant shall contain* might be omitted'. The difference between the contents of a warrant and a regulation of the details of its allowance is plain.

The testimony of the witnesses is offered not to impeach the record (which it could not do) but to prove a recess was not necessary. On the contrary it proves exactly the case stated by the court in *Intermela vs. Perkins*—that the council finding itself *unable to complete or transact* the business in hand at that session, took a recess.

VIII.

WERE THE JUDGMENTS AND THE WARRANTS ISSUED IN PAYMENT OF THEM FRAUDULENT AND VOID?

The defendant's argument under this head is based on a false assumption of fact, viz: that the

judgments were taken by consent of the city attorney and council, that there was a pretended but no real defense, and the city officers agreed with the warrant holders that they would make no defense and take no appeal in any cases then brought or to be brought.

There is absolutely no evidence of all this. The pertinent facts shown by the record in this case are in brief these:

Four cases entitled:

Bank of British Columbia vs. Port Townsend,

E. M. Johnson vs. Port Townsend,

E. Henschober vs. Port Townsend,

First National Bank vs. Port Townsend,

were begun some time before the judgments were obtained. It does not appear when, but they went to the Supreme Court on appeals from dismissals on demurrer, as admitted (Transcript, 175).

Bank of British Columbia vs. Port Townsend, 16 Wash. 450;

E. M. Johnson vs. Port Townsend, 16 Wash. 701;

E. Heuschober vs. Port Townsend, 16 Wash. 701;

First National Bank vs. Port Townsend, 16 Wash. 702.

They all involved identical issues, and all depended by stipulation on the decision in the first case named. Evidently they were begun long before they came to judgment, for the Supreme Court decision was handed down on February 11, 1897, and they seem to have gone up on dismissals upon demurrers to second amended complaints. See Transcript, 27. The ordinary procedure to reach that stage of the pleadings and an appeal, argument and decision after that takes some months at least. Other cases were brought on similar grounds by other warrant holders, and seem to have awaited the outcome of appeals in these four cases. One of them was that of *The Manchester Savings Bank vs. Port Townsend,* in which the complaint was verified on June 25, 1895. (Transcript, 47-69). The complaint in that case and the Bank of British Columbia cases are copied into the answer in this case and set forth verbatim at pp. 27-46, and 47-69 of the Transcript. From these it appears that the cause of action in the British Columbia Bank case was the city's failure to collect the assessments for the street grades and thus to provide a fund to pay the grade warrants, so that the assessments became outlawed (Transcript, 30, 31); and that in the Manchester Bank case was

the city's failure to take any steps, make or pursue any assessment, or provide any fund. (Transcript, 64, 65). At some time or other nine cases in all were brought—mostly by different attorneys. There is not the least sign of fraudulent collusion among them or with the city attorney or officers. Each lawyer, like the Gow Chrom, was fighting for his own hand. Naturally there was co-operation in abiding the result of a test case. While the details of contracts, grades, etc., varied, all turned on the question—Is the city liable if it fails to provide, or to enforce and keep alive, assessments on the abutting property, as a resource to pay the grade warrants? Whether the default was in creating the fund, or in letting it lapse and outlaw, the same question arose. That the city made an honest and vigorous contest is shown by the fact that the Bank of British Columbia did not get its pleadings into shape for a test by appeal before its second amended complaint. The other three cases appealed were apparently in a like condition.

The opinion in *Bank of B. C. vs. Port Townsend,* 16 Wash. 450, was written by Hon. Thomas J. Anders, who sat on that bench for many years—an able, painstaking judge. He summarized the same complaint which is pleaded *verbatim* here (Transcript, 27-46), and then discussed plainly, without

evasion, all of the points made against the complaint, particularly the vital point of the city's liability.

The city's liability was thus settled in those four cases. The decision, right or wrong, and whether or not it was overruled by

German-American Savings Bank vs. Spokane,
17 Wash. 315,

was the law of those cases. It became *res adjudicata* in those cases; and the court will observe that of the thirty warrants in suit herein, sixteen, aggregating $7880.00, were issued to the Bank of British Columbia, in part payment of the judgment granted to it in consequence of that decision.

But furthermore the same decision, if not strictly an estoppel of record in favor of the plaintiffs in the other five cases, was binding on the courts as an adjudication on a state of facts similar to theirs, and justified like judgments for them. Indeed many authorities hold that appellate decisions are binding not merely as authorities but as adjudications in parallel cases brought by other parties arising from the same transactions.

The decision in 16 Washington having been made in February, 1897, for some reason not apparent the four cases appealed and four others were not pressed for trial till in December, 1897. That

certainly does not look like any collusive agreement. The ninth case, by Elliott, was brought to trial earlier, because, as shown by *Intermela vs. Perkins,* which grew out of the Elliott warrant (No. 2 of this series), the time to appeal expired about the time of the meeting of February 15, 1898.

This brings us down to the actual trials and entry of judgment—on December 18, 1897, for the hearing and later dates for the signing of findings and judgments. The defendant's counsel argues that the filing of so many exhibits in those cases on the same day, and the immediate allowance of judgments infer a collusive understanding between the opposing attorneys. It is the barest conjecture, born of imagination and suspicion. The law had been settled; the city evidently had no defense on the facts, and there was nothing to do when the proper documents were presented to make technical proof, but to enter judgment. The essential issue was single and simple—the city's liability. That was well understood by the court and by the counsel on both sides. The multiplicity of the documentary proofs neither complicated the issue nor impeached the fairness of the trial judge's prompt decision. If there was any fraud or collusion among the attorneys, we should have some other evidence of it than a copy of the court minutes showing numerous

filings. And if there was none, the objection is an insinuation against the character of the trial judge.

The counsel next asks this court to take judicial notice of the fact that 'all important cases are appealed to the Supreme Court, especially in the State of Washington'! This would make 'judicial notice' a good deal more elastic than that famous variable measure known as 'the chancellor's foot'. We have lately known a trial judge in Seattle, moved by a fervid conviction of the ills of intemperance, to take judicial notice that a saloonkeeper pays and can afford to pay much higher rents than other folk. But it is going him 'one better' for a court of another sovereign to take judicial notice of the amount and relative importance of all appealed and unappealed litigation in a whole State.

Soberly, and in cold fact, there is not a scintilla of evidence that these judgments were 'consent judgments', that there was any collusion or secret understanding. The whole idea is nothing but innuendo and 'fancies light as air'.

The same thing is true as to the conclusion of the city council to pay the judgments. Much is sought to be made of the interview with Mr. Coleman (Transcript, 162-168), and the advice he gave. But the very fact that his advice was asked and the

mayor and council did not rely solely on the city attorney shows an absence of collusion or fraudulent intent. And even 'legal fraud' cannot be inferred from a painstaking search for the wisest course. These cases had once been to the Supreme Court. It does not infer fraud or even that acquiescence or consent which sometimes is called 'legal fraud' that the council did not decide to appeal them again. Everything was open and public. The thing was not done in a corner. Every councilman, the mayor, clerk, marshal, city attorney were present at the three sessions on February 15, 16 and 17. The recess sessions were held in the day-time. Evidently negotiations were going on. There was not a dissenting voice in the ultimate conclusion that the best thing was to settle and pay up.

But the defendant's argument is based not only on a false assumption of fact, but on an erroneous statement of the law. *German-American Savings Bank vs. Spokane,* 17 Wash. 315, on which it depends, did not decide absolutely and unequivocally that a city is not liable and cannot become liable for a default to enforce and collect street grade warrants. The majority opinion in a very diffuse and discursive review of the arguments, pro and con, and of decisions in other states, suggesting and not answering sundry questions of the basis of municipal

liability, finally said that they (the majority) 'are of the opinion that the decided weight of authority is against allowing a recovery of the city' upon failure to collect street grade wararnts, '*in the absence of an express lawful contract to that effect.*' 'However,' it said, 'it is not necessary to go that far in this case, at least at this time. But we desire to reaffirm the doctrine laid down in *Stephens vs. Spokane,* 14 Wash. 298, that there can be no recovery of the city at all while the assesment plan can be enforced in any way.' 17 Wash. 340, 341. Further, after discussing other cases in Washington, it said: 'In view of this and the subsequent expression noticed in later decisions, we desire to regard the express point above mentioned [the point of the city's liability for failure to make or collect the assessment] as not definitely settled or passed upon here, except in so far as sustaining the complaint in the *Port Townsend* case alluded to [*Bank of B. C. vs. Port Townsend,* 16 Wash. 450] may have incidentally held it as the law of that case,' p. 342. And then it asks and leaves unanswered several questions as to the ultimate ground of the liability. pp. 342, 343. All this shows that the whole subject was in a state of flux in the minds of a majority of that court. So that the very point in this German-American Bank case—viz.: 'the delay and negligence on the part of the city's officers in

providing the fund'—was left open for future discussion and unequivocal decision, although in the actual case at bar there, the plaintiff was defeated. If this court will take the time patiently and critically to read that lengthy and somewhat confused and involved opinion, and to compare it with that in *Bank of B. C. vs. Port Townsend* and with the later cases, it will see that nothing was absolutely settled in the German-American Bank case; that earlier cases had positively held cities liable for such defaults; that there was a period from 1897 onward, when the law was unsettled, and that the broad general doctrine that a city cannot be made so liable in any event and under any circumstances, for which the defendant's counsel contend, has never yet been established as the law of Washington.

Now the complaint in *Bank of B. C. vs. Port Townsend* charged as the ground of action that the city had by ordinance prescribed a method of assessing improvement charges, and laid the levy, under contract with the contractor to provide a fund to meet the warrants to be issued to him, but it had neglected to create the fund, to collect the charges and to enforce the lien for them, and it had let the legal time for collection lapse so that the lien and assessment were lost.

(Transcript, 28-31.)

In *Manchester Savings Bank vs. Port Townsend* the complaint in fuller detail pleads the ordinances establishing the system of street assessments and the district to be improved, the contract let for it, and the city's refusal to make the assessment, or take any steps to collect the cost of the improvement, although the plaintiff had 'repeatedly applied' to the mayor and council to do so; that the value of the abutting property had fallen meantime and the lien had been lost by lapse of time and by intervening transfers and tax-liens.

(Transcript, 51-67.)

We see, then, that the German-American Bank case, on which such reliance is put,

admits that the *Bank of B. C. vs. Port Townsend,* 16 Wash. 450, established the law of the case for those suits;

admits that the city may make itself liable by an express lawful contract;

and does not unequivocally rule that the city is not liable for failure to create the fund or enforce the assessment, but leaves the question open.

Therefore we have here a situation where—four of nine judgments were controlled by *Bank*

of B. C. vs. Port Townsend, 16 Wash. 450, *as the law of those cases,* and the other five were governed thereby, even if it was not expressly *res adjudicata;*

the city by the terms of the grade warrants guaranteed their payments, and in reliance on that the contractors accepted them and believed the city would collect the assessments; and

all nine judgments fall within the qualifying clauses of the opinion in *German-American Bank vs. Spokane,* 17 Wash. 315, as possible grounds of municipal liability.

Most of the cases in Washington which the defendant's brief cites under this head were cited by the same counsel in *Intermela vs. Perkins,* and were analyzed and explained in our brief therein. To avoid repetition, we beg the court to consult those briefs. On the main grounds of defense, this cause is simply a twice-told tale.

The well-settled rule that the merits of a cause once litigated and passed into judgment in a court of general jurisdiction cannot be re-opened and retried, needs no discussion—although it had to have such in the *Intermela* case to repel the defenses's insistence that it could re-try those old cases.

Cromwell vs. County of Sac., 94 U. S. 351;
United States vs. New Orleans, 98 U. S. 381;

State ex rel. Ledger Pub. Co. vs. Gloyd, 14 Wash. 5.

But there is an effort now in this case to take this case out of the general rule on the ground that those were 'consent judgments', and on such the court will not hold itself bound by the prior record, but will look into the merits, especially where the new case is brought to enforce the old judgment by special process.

The argument depends on the assertion of 'consent judgments', and without that fact, it falls. As to that we have only this further to say:

The record is wholly bare of evidence of any agreement, express or implied, open or collusive, corrupt or merely unwise, between any of the city's officers and any of the creditors or their agents, that the city by default or otherwise, would let judgment go against it, as to any pending or future cases;

It is wholly bare of evidence that any such judgment was entered, with or without agreement.

The answer pleaded that defense, but no evidence in support of it was offered.

Some cases cited on this point may receive brief comment.

Ward vs. Joslin, 186 U. S. 142,

arose under a state statute which imposed a *double* liability on stockholders. Of course, they are compellable to pay into the treasury their single liability on stock subscriptions; but as to the additional amount the court held that a judgment against the corporation on an *ultra vires* contract was not binding on the stockholders, on the ground that the state constitution and statute only imposed that extra liability as to debts incurred in usual course of business and within the corporate powers. This case has only the remotest resemblance to the case at bar.

Schrader vs. Mfrs. Nat. Bank, 133 U. S. 67, was another case of stockholders' liability. After the bank had failed, its president had settled with certain creditors, in part by turning over to them bills receivable of the bank with indorsement or guaranty in the bank's name. Some years later a suit was brought and judgment taken on such attempted liability of the bank, without the knowledge of its stockholders. It was held that the president had no power to create or continue a liability of a bank in liquidation, and it was open to the stockholders to attack the judgment when sued on their personal liability, because that liability was

only for the debts incurred in the regular course of business, which ceased when the bank failed.

Brownsville Taxing District vs. League, 129 U. S. 493,

was a case of mandamus to levy a tax to pay judgments for interest on bonds. It was held that by repeal the city had lost the power to tax for paying the judgments; that thereby the judgment creditors were thrown back to the bonds, and that the bonds were issued under an abrogated statute, so that no power to tax remained existent. It does not resemble this case even remotely. There will be here no need, as there, to go back to and depend on the original causes of action which were merged in the judgment, because the judgment here before the court is a self-sufficient verity, and to enforce it by the process of this court we do not need to show its cause or origin, or that of the former judgments which were the source of the warrants for which this judgment was rendered.

IX.

IS THE CONSTITUTIONAL DEBT LIMIT A VALID DEFENSE?

The case of

State ex rel. Ledger Pub. Co. vs. Gloyd, 14 Wash. 5,

cited in our brief in *Intermela vs. Perkins,* is conclusive on this point. It has never been overruled or qualified.

This court said, in the *Intermela* case,

> 'There is no evidence on the record showing that the City of Port Townsend was indebted beyond its statutory limitations at the time the indebtedness was incurred for the local street improvements in question, although the answer alleges facts showing that such was the case. Further than this, it is at least a disputed question whether such indebtedness as may be thrust upon the city by neglect or refusal to perform its obligations with contractors for local improvements, in providing funds for the payment of such contractors, falls within the inhibition against incurring indebtedness beyond a specified sum. *Baker vs. City of Seattle,* 2 Wash. 576, 27 Pac. 462; *Winston vs. City of Spokane,* 12 Wash. 524, 41 Pac. 888; *McEwan vs. City of Spokane,* 16 Wash. 212, 47 Pac 433; *Denny vs. City of Spokane,* 79 Fed. 719, 25 C. C. A. 164. But, be that as it may, in any event the question is one involving the application of general law in connection with statutory construction, which a court of general jurisdiction is competent to entertain and decide.'

As there suggested, the question is one of general, not local, law. The federal courts follow state courts in their construction of local statutes; but they decide for themselves whether a given question falls within or without the purview of state statutes. The questions here are largely in the field of general jurisprudence. The Washington courts do not place

their decisions on municipal liability upon local statutes, but on the general law of municipal corporations. The eminently wise and just principle established by the federal courts for the protection of non-resident creditors, that their rights cannot be destroyed by a change in judicial decisions of local courts after the rights become vested, applies with peculiar force here.

Gelpcke vs. Dubuque, 1 Wall. 175,

is exactly apposite to the case at bar, if we assume that the *German-American Bank* case was a complete and unequivocal reversal of the former rulings of the state court. In each case, earlier rulings of the state court had become settled law that a certain class of liability existed; in each paper instruments had been accepted for value on the faith of that settled law, and rights had become vested; in each a later state ruling was inimical to that reliance reposed by a non-resident creditor. The parallel is exact.

In later decisions the U. S. Supreme Court has gone farther and held that 'in matters of contract it is the right of citizens of the different states to demand the independent judgment of the federal courts, even though their decision may involve to some extent state statutes.'

Butz vs. Muscatine, 8 Wall. 575;

United States ex rel. Army vs. Burlington, 154 U. S. 568;

Pleasant Twp. vs. Aetna L. Ins. Co., 138 U. S. 67

But we do not need to go so far. We plant ourselves on *Gelpcke vs. Dubuque* as all-sufficing for this case; because it completely disposes of every contention of the defendant. For the doctrine of equitable estoppel on which that case rests goes behind all questions of loss of jurisdiction or of power of the city to become liable by change of court decisions, erroneous judgment of the state court that the city was liable, constructive fraud by waiver of appeal and by compromise, power of the city council to issue the warrant, and depends on that *good faith* as the cement of all human relations (municipal and personal alike) which it is one of the high functions of the federal courts to vindicate.

CHARLES E. SHEPARD,
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November 10, 1916.

No. 2833

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THE CITY OF PORT TOWNSEND,
Plaintiff in Error,

vs.

THE FIRST NATIONAL BANK OF CENTRAL CITY, COLORADO,
Defendant in Error.

ADDENDUM TO THE BRIEF OF THE DEFENDANT IN ERROR.

We beg leave to submit to the Court the following observations, which were suggested in argument at the bar, but were not stated in our brief.

Under Point VII. on the legality of the proceedings at the 'recess' sessions:

Quite independently of the construction or effect of the charter provision, prohibiting the allowance of claims at 'adjourned' meetings, the city is estopped by its course from raising that defense. The judgments had been entered; they were debts of record—to all appearance and on the

face of things unimpeachable verities. It was necessary for the city within a short time to take one or two courses: that is, either (1) to attack each of those nine judgments by an appeal or by a petition or other legal mode of setting aside or opening the judgment; or (2) to pay it. For if neither were done, mandamus to compel payment was in near prospect. Thereupon the judgment creditors came to the city authorities for payment; and the council said 'We will pay you now, by warrants'. The creditors said 'We accept', satisfied their judgments and took the warrants. Now if the city within some reasonable time after that had repudiated its action, the creditors might have been put *in statu quo*—though probably only on condition of terms, such as to reinstate the judgments and pay costs. It might even be plausibly argued that that might be done even up to the extreme limit of outlawry of the original causes of action, or of the judgments. But by this defense of technical illegality, if successful, the city will have led us to satisfy judgments which we cannot now reinstate, because both the judgments and the causes of action are far past outlawry. Nor could the city say, it would waive that defense to a new suit; for its counsel's position is that a city cannot waive or consent to anything; and even if it could, we could not be restored to our former position, for a new

judgment would have to be paid by new indebtedness fund warrants, after a long list of intervening warrants.

It is a situation, therefore, where the familiar principle of estoppel *in pais,* or equitable estoppel, applies: the city has led us into a position where we cannot retract, and hence it is estopped from saying that its act which led us there was illegal.

Nor should it be overlooked that the council's resolution did not create any new debt. The debt was already existent, and of the highest verity; its form only was changed. And that change bore all the marks of unanimous approval and perfect regularity. The warrants went out, and were dealt with, in the market, as such warrants usually are; and even though not strictly negotiable under the law merchant, are universally known to be sold and bought as investments, like negotiable paper. Therefore the charter provision should be construed as a regulation of the council's mode of transacting its business, rather than as a prohibition avoiding in the hands of innocent purchasers any instrument created in contravention of it. It is like the statutes prohibiting a corporation of another state from doing business without filing its articles and appointing a local agent for service of process; under which it is now well settled, even as to non-

negotiable liabilities that the statute is not a defense against a contract made in disregard of it, unless it expressly denounces as void any such contract and forbids a suit on it. The issue of a warrant, duly signed, under such circumstances, involves an implied recital of technical regularity and validity, as well as the express recital of its consideration and purpose.

Under Point VIII. on the validity of the judgments:

Nearly the same as the foregoing may be said in rebuttal of the city's plea that the judgments were 'fraudulent and void'. The law very wisely holds that one who acquiesces in or who treats as valid an apparent liability is debarred, at least after a reasonable time, from saying it was not valid. Such shifting of attitude amounts at the least to a waiver; at the most to an absolute estoppel. Particularly so, where not merely the original creditor, but others, nay many others, who have dealt in reliance on the city's acquiescence and waiver were thereby lured to their loss, if the city can now shift its stand. And all the settled doctrines of law, as to judgments—that they are presumptively unimpeachable, that they must not be lightly set aside, that the defense of fraud, *dehors* the record, must be established not only by the weight of evidence,

but by its overwhelming preponderance, that fraud will not be surmised but must be clearly and positively proved—all these and allied doctrines which uphold the stability of courts, and are so familiar that they hardly seem to need mention, unite to show how flimsy, how unsubstantial in both law and fact, is this defense.

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